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In the Supreme Court of the United States

OCTOBER TERM, 1956

WILLIA NIUKKANEN, ALSO KNOWN AS WILLIAM NIUKKANEN, ALSO KNOWN AS WILLIAM ALBERT MACKIE, PETITIONER

v.

JOHN P. BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE, JOHN WILSON, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE OFFICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

J. LEE RANKIN,
Solicitor General.
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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 18–19) is reported at 241 F. 2d 938. The opinion of the District Court (R. 20–23) is reported at 148 F. Supp. 106.

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1957 (R. 90). A petition for rehearing was denied on April 9, 1957 (R. 91). The petition for a writ of certiorari was filed on May 13, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence at petitioner's deportation hearing was sufficient to establish that he had been a member of the Communist Party.

2. Whether the Board of Immigration Appeals abused its discretion in denying petitioner's application for suspension of deportation.

3. Whether the statute requiring the deportation of past members of the Communist Party is constitutional.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the District of Oregon, which had dismissed the petition for a writ of habeas corpus by which petitioner challenged an order for his deportation.

Petitioner has been ordered deported on the basis of a finding that he had been a member of the Communist Party from 1937 to 1939. At hearings before a special inquiry officer in May, 1953, two former members of the Communist Party, Walter Wilmot and Lee Knipe, testified that they knew petitioner as a member of the Communist Party from 1937 to 1939, and had seen him at closed Party meetings (Tr. 12–16, 17, 26–27, 65–67).[1]

Walter Wilmot, who had been editor of the Labor New Dealer in Oregon from 1937 until his expulsion

[1] The immigration file is being lodged with the Clerk and is referred to as "Tr.". The first twenty pages, which contain various opinions separately numbered, have been paginated consecutively in pencil in the lower right hand corner with the letter "a" following the numeral.

from the Party in 1939, and had attended meetings of many branches of the Party in that capacity (Tr. 13–15, 30), testified that petitioner belonged to the Albina branch and was in the "top fraction" of the Party, with the exception of matters relating to waterfront activity (Tr. 27). Wilmot specifically remembered seeing petitioner's Party book on one occasion when petitioner paid dues at the Party headquarters (Tr. 14–15, 45).

Knipe testified that petitioner took an active part in meetings of the Albina branch of the Communist Party and that he was on the executive board of the branch although he did not hold office (Tr. 66–68). Knipe had seen petitioner hand over his book and pay dues to the secretary of the Albina branch (Tr. 69).[2]

The special inquiry officer found petitioner deportable (Tr. 15a–20a). In upholding his decision, the Board of Immigration Appeals pointed out that, even if Knipe's credibility was weakened by his original false testimony as to his conviction, there was substantial and probative evidence of petitioner's membership in the Communist Party in the unimpeached testimony of Wilmot (Tr. 13a–14a).

Although petitioner had not applied for suspension of deportation during the 1953 hearings, the proceed-

[2] Knipe, when he first took the stand testified that he had never been convicted of a felony (Tr. 64). On cross-examination, he admitted he had been convicted of a crime (Tr. 76). He refused to answer whether he had been convicted of forgery (Tr. 77–81). Subsequently, he explained that he had been convicted of cashing a fictitious check, and said he thought the charge was a misdemeanor (Tr. 86–87).

ings were reopened, on his motion, to permit him to apply for such relief. At hearings held in February 1955, petitioner testified that in 1937 and 1938, he belonged to a federation for the unemployed, which probably was the Worker's Alliance (Tr. 195–196). When asked if he had paid dues, he said (Tr. 196):

> I wish I could answer it definitely, but it seems to me they used to have a membership book and if they had dues I don't suppose it was very much. Maybe ten cents a month. Now I am just guessing, if I remember right now. It is kind of hazy. I don't remember definitely.

He denied that he had ever seen Wilmot (Tr. 200). He testified that he knew Knipe, but did not know whether Knipe was identified as an officer of a particular organization; and that he saw Knipe at dances and meetings of the Unemployed Council or Workers Alliance (Tr. 199–200). When asked by his attorney if he ever attended Communist Party meetings, petitioner answered (Tr. 200):

> Well, if I said yes and if I said no maybe I wouldn't be telling the truth, because I really couldn't tell one way or the other. I went to meetings there. Sometimes maybe they were Communist, and maybe they wasn't. It could have been and maybe they wasn't.

He later testified that he had never knowingly been a member of the Communist Party of the United States (Tr. 204).

He also testified that he did not "read much on the political side" (Tr. 201). He could not remember whether in 1938 he had signed a petition to place the

name of James Murphy, Secretary of the Communist Party, in nomination for the legislature, and testified that he did not see how he could have signed a voter's petition since that would have been against the law (R. 208–209). In 1954, he had attended meetings of the Committee for the Protection of the Foreign Born because he was interested in the repeal of the Walter-McCarran Act which he considered against the principles of the United States (Tr. 202–203, 217–220).

The special inquiry officer recommended that suspension of deportation be denied (Tr. 6a–11a). He pointed out that the alien was "evasive as to his activities during the period between 1930 and 1940, particularly as to whether or not he had been a member of the Communist Party" (Tr. 8a). He found that "[t]he alien's testimony that he does not recall or denial of membership in the Communist Party is not credible" (Tr. 10a–11a).[3] The Board of Immigration Appeals affirmed (Tr. 1a–4a), finding that respondent "failed to submit any evidence showing that he is actively opposed to the doctrines and teachings of the Communist Party", and that, while there was clear evidence that respondent had been a member of the Party from 1937 to 1939, there was no proof of complete disassociation (Tr. 4a).

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[3] The hearing officer noted the fact that petitioner had attended meetings of the Committee for the Protection of the Foreign Born and that petitioner stated that he did not wish to become a "stool pigeon" in naming persons at that meeting. The opinion noted that "[a]lthough there is no doubt that the respondent was in fact a member of the Communist Party, he is not going to admit that he was disillusioned" (Tr. 9a–10a).

ARGUMENT

1. As both courts below held, there was sufficient probative evidence at the deportation hearing to support the finding that petitioner was a knowing member of the Communist Party from 1937 to 1939. Issues of credibility were for the trier of fact, not for the District Court on a habeas corpus petition. As the Board of Immigration Appeals noted in its original decision, even if the testimony of the witness Knipe is not credited (although the testimony as to his prior conviction of forgery does not require that his whole testimony be discredited), the testimony of the witness Wilmot was not shaken. That evidence was to the effect that petitioner was a card-carrying, dues-paying member of the Party, one of the "top fraction" of his branch. Under these circumstances, petitioner cannot be said to have been merely a nominal member within the exception noted by this Court in *Galvan* v. *Press*, 347 U. S. 522.[4]

2. At the hearing on petitioner's application for suspension of deportation, he denied that he had ever seen the witness Wilmot. Since the hearing officer credited the testimony of Wilmot, he had to find that petitioner was not telling the truth at the suspension hearing. The hearing officer specifically found, moreover, that petitioner's denial of membership in the Communist Party was not credible. This finding alone supports the conclusion that petitioner did not make a showing of good moral character which would justify the exercise of discretion in his behalf to grant

[4] Issues involved in *Galvan* v. *Press* are currently before the Court in *Rowoldt* v. *Perfetto*, No. 34, this Term, *sub judice*.

him the extraordinary relief of suspension of deportation.

Suspension of deportation is akin to a pardon. *Jay* v. *Boyd*, 351 U. S. 345; *Hintopoulos* v. *Shaughnessy*, 353 U. S. 72. Manifestly, there is no requirement that this relief be extended to one who is found to have lied under oath.

3. The constitutionality of the statute providing for deportation on the basis of past membership in the Communist Party was established by decision of this Court. *Galvan* v. *Press*, 347 U. S. 522. The decision in *Rowoldt* v. *Perfetto*, No. 34, this Term, may also bear upon this issue.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied. The Court may, however, wish to defer action on the petition until after it has rendered its decision in *Rowoldt* v. *Perfetto*.

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JUNE 1957.